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Thirty-third session

SUMMARY RECORD OF THE 697th MEETING

Held at Headquarters, New York,
on Monday, 26 June 2000, at 3 p.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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00-50182 (E)

The meeting was called to order at 3.05 p.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, 470, 472 and Add.1-4; A/CN.9/XXXIII/CRP.2 and Add.1 and 2)

1. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) pointed out that the reference to "receivables financing" in the title and preamble to the draft Convention had now been deleted. Accordingly, draft article 6 (c), which contained a definition of receivables financing and which had been left in square brackets, could now be deleted.

2. Mr. MORÁN BOVIO (Spain) and Mr. KOBORI (Japan) supported that suggestion.

3. The CHAIRMAN said that, in the absence of objection, he would take it that draft article 6 (c) should be deleted.

4. It was so decided.

Report of the Drafting Group (continued) (A/CN.9/XXXIII/CRP.2 and Add.1 and 2)

5. The CHAIRMAN invited the Commission to adopt draft articles 1 to 17, as contained in the report of the Drafting Group, with the exception of the language in square brackets.

Draft article 1 (A/CN.9/XXXIII/CRP.2)

6. Paragraphs (1) (2) and (3) of draft article 1 were adopted.

7. The CHAIRMAN said that a decision on paragraph (4) should be deferred, since it referred to a question not yet resolved by the Commission.

8. Mr. RENGER (Germany) said that paragraph (5) could only be finally approved once the annex to the draft Convention had been adopted, since the Commission had not yet discussed the connection between the annex and draft article 40.

Draft article 2 (A/CN.9/XXXIII/CRP.2)

9. Mr. TELL (France) said that the wording of draft article 2 referred only to the assignment of contractual receivables and did not make provision for non-contractual receivables. That was a serious shortcoming and might deter States in which transactions in non-contractual receivables were widespread from ratifying the future Convention. His delegation intended to consult with financial circles on the matter, with a view to making a declaration at the appropriate time that would provide for an "opt-in" arrangement for such practices.

10. The CHAIRMAN asked whether the representative of France wished the adoption of that article to be deferred.

11. Mr. TELL (France) said in clarification that he was suggesting another solution, namely, a declaration whereby provision could be made for the

assignment of non-contractual receivables in those States wishing to enable their economic operators to benefit from such transactions. He thought it unlikely that other States would object to such a solution.

12. Draft article 2 was adopted.

Draft article 3 (A/CN.9/XXXIII/CRP.2)

13. Draft article 3 was adopted.

Draft article 4 (A/CN.9/XXXIII/CRP.2 and Add.1 and 2)

14. Mr. WINSHIP (United States of America) said that the Drafting Group had agreed to delete the words "To the extent" in paragraph (1) (b). The text would then read: "Made by the delivery of a negotiable instrument, with an endorsement, if necessary;".

15. Mr. RENGER (Germany) said that the language of paragraph (3) (a), stating that the Convention did not "affect the question whether", was too colloquial for a legal instrument and was therefore unsatisfactory.

16. Ms. MCMILLAN (United Kingdom) said that the Commission had intended, in paragraph (3) (a), to state that the application of the future Convention to assignment of a receivable would not affect a right to real estate. It was important to make clear, in the new wording, that the draft Convention did not seek to change substantive law in respect of land or real estate. She hoped that the Secretariat would be able to reformulate the subparagraph in that light.

17. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that paragraph (3) (a) should be understood in the opposite sense: a right in real estate did not affect a right in a receivable related to it. Depending on the wishes of the Commission, subparagraphs (a) and (b) could be merged in order to state that the Convention would not affect priority rights to receivables in a conflict between holders of rights to real estate.

18. The CHAIRMAN said that the intention underlying subparagraph (a) was to establish the principle on which the rule in subparagraph (b) was based.

19. Ms. GAVRILESCU (Romania) said that a proper distinction must be drawn between priority rights and property rights in real estate, which were quite different things. Also, the word "or" in subparagraph (b) should be deleted.

20. Mr. WINSHIP (United States of America) said he could agree to the deletion of the word "or" in subparagraph (b). With regard to the question addressed by the representative of the United Kingdom, he supported the suggestion by the Secretary of the Working Group that subparagraphs (a) and (b) of paragraph (3) should be combined, to make clear that the priority rules concerning a right in real estate, if there was such a right, would be determined by law other than the Convention.

21. Mr. DOYLE (Observer for Ireland) shared the doubts of the United Kingdom representative concerning the language of subparagraph (a). He supported the suggestion of combining subparagraphs (a) and (b).

22. Mr. TELL (France) said that subparagraphs (a) and (b) of paragraph (3) were indissolubly linked, the second being dependent on fulfilment of the condition in the first. Subparagraph (b) should be clarified; he suggested amending "the right of an assignee of the receivable" to read "the right of an assignee to that receivable". He agreed with the representative of Romania that the subject-matter of subparagraphs (b) and (c) should be clearly distinguished. However, it was not necessary to delete the word "or", which was merely a stylistic device, although that could be done if subparagraphs (a) and (b) were combined. In the French version of paragraphs 2 (d) and 2 (f) "investment securities" should have been translated as "valeurs mobilières", not as "titres de placement".

23. Mr. Al-SAIDI (Observer for Kuwait) asked whether draft article 4 would be reviewed by the Working Group. Paragraph (2) (a) contained an exclusion for receivables arising from transactions on a regulated exchange; he did not recall any discussion of that provision by the Commission.

24. Mr. MORÁN BOVIO (Spain) welcomed the proposal to combine subparagraphs (a) and (b) of paragraph 3, which would help to clarify its meaning.

25. Ms. WALSH (Observer for Canada), supported by Mr. MORÁN BOVIO (Spain), suggested that, since the current wording of subparagraphs (a) and (b) of paragraph (3) was sufficiently clear, they should be combined by adding the word "and" at the end of subparagraph (a) and deleting the initial word "Affect" in subparagraph (b). The word "or" at the end of former subparagraph (b) should probably remain.

26. Ms. GAVRILESCU (Romania) said that, if the various parts of the provision were clear, there was no need for such linking words as "or", which could create uncertainty. If the Commission insisted on some sort of link, however, her delegation preferred the conjunction "and".

27. Mr. MOHAMED (Nigeria) said that subparagraph (a) was not well drafted, but he could agree to combining it with subparagraph (b). For the sake of logic, it would be better to start paragraph (3) with subparagraph (c).

28. The CHAIRMAN said that the Commission was clearly in favour of combining subparagraphs (a) and (b) of paragraph (3), and there was some support for the deletion of "or".

29. After a procedural discussion in which Mr. MORÁN BOVIO (Spain), Mr. RENGER (Germany), Mr. BURMAN (United States of America) and the CHAIRMAN took part, Ms. WALSH (Observer for Canada) suggested that some delegations should consult informally and return with a text.

30. The CHAIRMAN said that, in the absence of objection to that suggestion, further consideration of draft article 4 would be deferred for the time being.

Draft articles 5, 6 and 7 (A/CN.9/XXXIII/CRP.2)

31. The CHAIRMAN recalled that it had been decided to delete subparagraph (c) of draft article 5.

32. Draft articles 5, 6 and 7 were adopted.

Draft articles 8, 9 and 10 (A/CN.9/XXXIII/CRP.2/Add.1)

33. Draft articles 8, 9 and 10 were adopted.

Draft article 11 (A/CN.9/XXXIII/CRP.2/Add.1 and Add.2)

34. Mr. TELL (France), referring to the revised version of article 11 (3) (a) as it appeared in document A/CN.9/XXXIII/CRP.2/Add.2, which dealt, inter alia, with receivables arising under an original contract for the supply or lease of goods, said that the English term "goods" had in the French version been translated in a drastically restricted manner as "bien meubles corporels", (tangible assets). His delegation did not see why intangible assets (bien meubles incorporels) should have been excluded from the scope of the draft article, especially when they were far more important to businesses in the modern economy than mere merchandise. The misunderstanding stemmed from an original United States proposal regarding article 11 (3) (a) that had been very restrictive. He was not suggesting that the debate in the Commission should be reopened; but he did believe the matter needed to be referred to the Working Group.

35. Ms. WALSH (Observer for Canada) said that it was only in the Drafting Group that the policy difference had come out. With some reluctance, her delegation suggested placing the English and French terms in square brackets, so that the Working Group could discuss the question fully and make its proposal at the next session.

36. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) confirmed that the issue had been discussed in the Drafting Group, where it had been agreed that the term "goods" was always to mean movable, tangible goods. That instruction had been given also to the language revisers. The Commission, had never discussed the matter of intangible assets, however, and consequently had not given the Drafting Group a policy decision to implement in the matter.

37. Mr. DOYLE (Observer for Ireland) said that there were indeed issues of substance involved and the Working Group might have to take the matter up.

38. Mr. BURMAN (United States of America) said that the decision described by the Secretary had been taken in the Working Group after an extended discussion in which concerns had been fully expressed about the inclusion of intangible goods. His delegation believed that the text should stand but would not oppose its being taken up again by the Working Group.

39. The CHAIRMAN recalled that there was a clear decision of the Commission that the Working Group was not to reopen any matters that had been settled.

40. Mr. MORÁN BOVIO (Spain) said that he reluctantly favoured putting the terms in square brackets and asking the Drafting Group to work further on the text.

41. Mr. TELL (France) said that the Commission itself had never discussed the term in question nor taken a policy decision as to whether its scope was restricted to tangible assets. To his delegation it was obvious that the term covered intangible assets. The Working Group must work on the question.

42. The CHAIRMAN said he took it that the Commission wished to put the terms "goods" and "corporels" in square brackets for further discussion and to adopt draft article 11 with the exception of the bracketed language.

43. It was so decided.

44. Draft article 11 was adopted.

Draft article 12 (A/CN.9/XXXIII/CRP.2/Add.1 and Add.2)

45. The CHAIRMAN said he took it that, in keeping with the decision just taken on draft article 11 (3) (a), the Commission wished to put in square brackets the terms "goods" and "incorporels" in the English and French versions of article 12 (4) (a).

46. It was so decided.

47. Mr. DESCHAMPS (Observer for Canada) said that the French text of article 12 (5) differed from the English text and that he would be suggesting changes.

48. Draft article 12 was adopted.

Draft articles 13 to 17 (A/CN.9/XXXIII/CRP.2/Add.2)

49. The CHAIRMAN noted that the term "receivables financing" in article 13 (3) was no longer in square brackets.

50. Draft articles 13, 14, 15, 16 and 17 were adopted.

The meeting was suspended at 4.35 p.m. and resumed at 5 p.m.

51. The CHAIRMAN recalled that article 12 had been adopted subject to drafting changes in paragraph (5) of the French text (A/CN.9/XXXIII/CRP.2/Add.1) to bring it into line with the English.

52. Mr. DESCHAMPS (Observer for Canada), speaking on behalf of the francophone delegations, proposed that paragraph (5) of the French text should read:

> "Le transfert visé au paragraphe 1 du présent article d'une sûreté comportant des possessions n'a pas d'incidences sur les obligations du cédant envers le débiteur ou la personne qui accorde la sûreté relative au bien transféré en vertu de la loi régissant cette sûreté.".

53. It was so decided.

Draft article 4 (continued) (A/C.9/XXXIII/CRP.2 and Add.1 and 2)

54. The CHAIRMAN recalled that, in the light of the strong support for combining paragraphs 3 (a) and (b) of draft article 4 as they appeared in document A/CN.9/XXXIII/CRP.2/Add.2 and the proposal for the deletion of the conjunction "or", the Commission had decided that the English-speaking delegations should consult informally with a view to producing a text that incorporated those changes.

55. Mr. WINSHIP (United States of America), speaking also on behalf of the Canadian and German delegations, said that they had agreed on the following text:

> "(a) Affect whether a property right in real estate confers a right in a receivable related to that real estate, and does not determine the priority of such a right in the receivable with respect to the competing right of an assignee of the receivable;".

56. The conjunction "or" following the semi-colon and preceding paragraph (c) should be deleted.

57. Ms. GAVRILESCU (Romania) said that her delegation fully supported the United States proposal.

58. Ms. Li Ling (China) said that it was not clear to her delegation why the verb "determine" had been substituted for "affect". She questioned the repetition of the words "does not", since they already appeared in the chapeau.

59. Mr. BURMAN (United States of America) said it had been felt that the words "affect" and "determine" were each appropriate, in English, to the contexts in which they were used.

60. Mr. RENGER (Germany) said that the delegations involved thought that the proposed language was an improvement over the previous version. It might be further improved at some point in the future, but he thought a decision could be taken on the policy implications of the wording proposed.

61. Mr. TELL (France) said that he reserved the right to comment once he had seen the French version of the proposal. He wished to stress the difficulties of working on a proposal available in only one language, especially when the proposal was not in writing. His initial impression was that the only substantive change was the introduction of the word "competing", which was acceptable to his delegation. Any other problems were a matter of drafting, which need not be dealt with in the plenary Commission.

62. The CHAIRMAN said he took it that the proposed wording combining subparagraphs (a) and (b) of paragraph (3) was acceptable in the English version; the other language versions would be adjusted accordingly. The present subparagraph (c), as it appeared in document A/CN.9/XXXIII/CRP.2/Add.1, would become subparagraph (b).

63. Draft article 4, as orally revised, was adopted.

64. The CHAIRMAN recalled that, at its previous meeting, the Commission had considered whether the draft Convention should be referred back to the Working Group.

65. Mr. MOHAMED (Nigeria) proposed that any further consideration of the draft Convention should be undertaken by the Commission, since it was important to achieve the broadest possible participation and Governments of developing countries would be more willing to finance their representatives' attendance at a resumed session of the Commission, which might be convened in January 2001, than at meetings of the Working Group. Furthermore, if the draft Convention was returned to the Working Group, any revisions made would have to be transmitted to States for comments prior to their consideration by the Commission, which was not practical given the short time available.

66. Mr. BURMAN (United States of America) said that his delegation would have no objection to either course of action.

67. Mr. RENGER (Germany) agreed that the convening of a resumed session of the Commission might result in a larger attendance and would certainly expedite the finalization of the draft Convention.

68. Mr. PANG KHARG CHAU (Singapore) said that his delegation supported the Nigerian proposal.

69. Mr. MORÁN BOVIO (Spain) said that the draft Convention should be referred back to the Working Group for reasons of both tradition and economy. No summary records would be produced for meetings of the Working Group, which would result in a considerable saving.

70. Ms. SABO (Observer for Canada) said that, if a resumed thirty-third session was convened in January 2001, the Commission's thirty-fourth session in May would have to be truncated by at least one week. It would be more efficient to refer the draft Convention back to the Working Group.

71. Mr. TELL (France) said that his delegation remained convinced that it would be better for the Commission itself to finalize the text at its thirty-fourth session since the Working Group had already completed its work. Sending the text back to the Working Group would mean that issues on which the Commission had already taken a decision would be reopened, which would be procedurally irregular. His delegation would, however, be prepared to endorse the Nigerian proposal, which constituted a good compromise since it took account of the concerns of delegations that wished to avoid delays in adopting the draft Convention.

72. Mr. MARADIAGA (Honduras) said that, if the Working Group met in December and a resumed session of the Commission was convened shortly thereafter to consider the outcome of the Working Group's work, the adoption of the draft Convention could be expedited considerably.

73. Mr. GHAZIZADEH (Islamic Republic of Iran) said that his delegation was in favour of sending the draft Convention back to the Working Group.

74. Mr. DOYLE (Observer for Ireland), supported by Mr. MARKUS (Observer for Switzerland), said that there appeared to be only limited support for the Nigerian proposal, whereas, at the Commission's previous meeting, a clear majority had favoured returning the text to the Working Group. He saw no need to prolong the discussion.

75. Mr. LAMBERTZ (Observer for Sweden) said that further work on the draft Convention was needed before the Commission reverted to it. He therefore agreed that it should be sent back to the Working Group.

76. The CHAIRMAN said, he took it that the Commission wished to return the draft Convention to the Working Group.

77. It was so decided.

78. The CHAIRMAN then invited the Commission to consider the terms of reference of the Working Group.

79. Ms. SABO (Observer for Canada) said that the delegations which had consulted on the terms of reference she was about to propose had attempted to address concerns that the Working Group should not reopen questions already settled. The proposal was in four parts:

> "1. Beginning with article 18, the Working Group should review those parts of the draft Convention that the thirty-third session of the Commission has not had the opportunity to examine and the text remaining in square brackets in articles 1 to 17.
>
> "2. In light of the modifications made to articles 1 to 17, the Working Group should ensure that the coherence and consistency of the text are maintained.
>
> "3. If, as a result of its consideration of articles 18 through to the annex, the Working Group identifies issues in articles 1 to 17, it should bring these issues to the attention of the Commission with an appropriate explanation and a recommendation, if possible.
>
> "4. As to its working methods, the Working Group should adopt the same approach as the Commission, that is, it should make only those changes that meet with substantial support."

As it worked on articles 18 and following of the draft Convention, the Working Group would identify changes it believed to be necessary in articles 1 to 17 and, rather than alter the text, would make recommendations for the Commission's consideration.

80. Mr. WINSHIP (United States of America) said that there were two pieces of unfinished business the Working Group might also be asked to undertake. First, it might consider the UNIDROIT proposal (A/CN.9/XXXIII/CRP.7), which related to the topic of conflicts with other international agreements dealt with in the second part of the draft Convention. Second, the Working Group might address the question whether a limited definition of location should be devised for

financial institutions. When the Commission had considered a general definition of location and a general provision for branches, there had been some support for a specific rule for branches of financial institutions.

81. In general, the Working Group should not touch the wording of articles 1 to 17, but it might be asked to polish the wording of article 4 (3) (a), from a purely editorial standpoint.

82. Mr. TELL (France) said that the Canadian proposal was very helpful, although it appeared necessary to clarify the mandate of the Working Group with respect to articles 1 to 17. Given the mention of consistency in paragraph 2 of the proposal, for example, he was not sure whether the Working Group was being instructed to make its work on articles 18 through to the annex consistent with articles 1 to 17 or the reverse.

83. His delegation's position was that the Working Group should not touch articles 1 to 17, except for purely editorial reasons. For that reason, it opposed the suggestions by the representative for the United States. Although his delegation was favourable to the idea of a specific rule for branches of financial institutions, since the Commission had discussed the matter at length, it was for the Commission itself to take the matter further at its next session, if it wished. Matters debated by the Commission should not be re-debated by the Working Group; to make exceptions was to open Pandora's box. The same arguments applied to the question of the UNIDROIT draft Convention on International Interests in Mobile Property, but in the latter case there was the additional consideration that on UNIDROIT's side no considerable progress would have been made by the time the Working Group met.

84. Ms. GAVRILESCU (Romania) said that the terms of reference should make clear that, in accordance with Commission policy, everything the Commission had approved and adopted should be left untouched. The Working Group should be specifically instructed not to debate questions and policy already settled or to reopen discussion of articles 1 to 17.

85. Ms. SABO (Observer for Canada) said that her delegation agreed with the French representative that no exceptions should be made to the rule that issues debated by the Commission should remain the concern of the Commission.

86. Mr. PANG KHARG CHAU (Singapore) said he was sure that it was not the intent of the Canadian proposal to authorize the Working Group to alter articles 1 to 17. The language of the proposal might be clarified by adding the words "in reviewing articles 18 through to the annex" to paragraphs 2 and 4 of the proposal, which would make clear that the Working Group must align its thinking with that of the Commission and not the reverse. However, it was perfectly acceptable for the Working Group to make recommendations regarding articles 1 to 17, pursuant to paragraph 3 of the proposal, if it detected difficulties.

ELECTION OF OFFICERS (continued)

87. Mr. MOHAMED (Nigeria), speaking on behalf of the Group of African States, nominated Mr. Gamledin Awad (Egypt) for the office of Vice-Chairman.

88. Mr. Gamledin Awad (Egypt) was elected Vice-Chairman by acclamation.

89. Ms. VIRBICKAIRE (Lithuania), speaking on behalf of the Group of Eastern European States, nominated Ms. Gavrilescu (Romania) for the office of Vice-Chairman.

90. Ms. Gavrilescu (Romania) was elected Vice-Chairman by acclamation.

The meeting rose at 6.05 p.m.